1988

James Hornsby v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints : Brief in Opposition to Certiorari

Utah Supreme Court

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Allen M. Swan; M. Karlynn Hinman; Kirton, McConkie and Bushnell; Stephen G. Morgan; Morgan, Scalley and Reading; Attorneys for Respondents.

DOCKET NO. 880318

IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES HORNSBY,	:	
Plaintiff-Appellant-Respondent	:	BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI
v.	:	
CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,	:	(Brief in Opposition to Petition for Certiorari to Review Judgment of Court of Appeals)
Defendant-Respondent-Petitioner:		Supreme Court No. 880318
CHARLES GIBLETT, JOHN SUTTON, and JOHN DOES I through X, inclusive,	:	
Defendants-Respondents	:	

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QUESTION FOR REVIEW

IN A LAWSUIT IN WHICH ONE PARTY IS A RELIGIOUS ENTITY, IS IT REVERSIBLE ERROR FOR THE TRIAL COURT JUDGE TO REFUSE TO VOIR DIRE PROSPECTIVE JURORS AS TO CERTAIN MATTERS INVOLVING THEIR RELIGIOUS AFFILIATION, SO THAT A LITIGANT MAY INTELLIGENTLY EXERCISE PEREMPTORY CHALLENGES?

UTAH COURT OF APPEALS DECISION

The decision of the Utah Court of Appeals concerning this case is reported at 87 Utah Adv. Rep. 23 (Ct. App. 1988)

BASIS FOR JURISDICTION

A. The decision to be reviewed was entered on July 26, 1988.

B. On September 23, 1988, Respondent herein filed a stipulation and motion for an extension of time in which to file his brief. An order granting Respondent's motion was entered on

September 23, 1988, thereby granting Respondent until October 8, 1988 in which to respond to Petitioner's Petition for Certiorari.

C. Rule 44(c), Rules of the Utah Supreme Court, is inapplicable.

D. The Utah Supreme Court has jurisdiction to review the decision in question by a writ of certiorari pursuant to Utah Code Annotated, Section 78-2-2(3):

> The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:
>
> (a) a judgment of the Court of Appeals;

STATEMENT OF THE CASE

1. Nature and Proceedings. This lawsuit was initiated to recover damages for personal injury sustained by plaintiff, James Hornsby when he laid down his motorcycle so as to avoid colliding with a cow that had escaped while defendants were attempting to load livestock on a truck. Judgment for defendants was entered upon a jury verdict. Plaintiff appealed, alleging inter alia, that the questioning of potential jurors during voir dire had been improperly limited. The Court of Appeals (Bench, Billings, Jackson, JJ.), reversed and ordered a new trial, holding that the trial court's refusal to question the jurors concerning their membership in a defendant religious entity improperly curtailed the plaintiff's ability to intelligently exercise his peremptory challenges. Hornsby v. Corporation of the Presiding Bishop, 87 Utah Adv. Rep. 23 (1988) See appendix A.

2. Statement of Facts. Petitioner Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints is a religious corporation sole which holds title to a number of LDS properties, including a farm in Salt Lake County which is part of its welfare program. One Charles Giblett managed the farm. (R. 650, 631; Hornsby, at 23; App. A.)

On March 30, 1983, Giblett and defendant John Sutton, owner of farmland adjacent to the LDS farmland, attempted to move two cows that had escaped from the LDS property to one of Sutton's pastures. In attempting to relocate the cattle, one of the cows escaped. (R. 629, 630, 650, 673, 662, 691, 598, 658, 660, 662, 663; Hornsby at 23; app.A.)

Giblett and Sutton pursued the runaway cow with the help of two boys and Sutton's daughter Mary. Mary drove her car up and down the area and then pulled to the roadside to search on foot. After spotting the runaway cow, she returned to her car. She saw Plaintiff Hornsby approaching on his motorcycle and waved her arms to get his attention. (R. 643, 938, 775, 561, 584, 777, 792, 780, 782, 799, 797, 793; Hornsby at 23; app. A.)

After Hornsby had passed Mary, he saw the cow come onto the road and he dropped his motorcycle, sustaining injuries in the process. Hornsby filed a cause of action, alleging a variety of claims of negligence. (R. 647, 923, 798, 579; Hornsby at 23; app. A.)

During the voir dire process of the trial, the court asked prospective jurors the following question:

> Are there any of you who feel that you would have trouble being an impartial juror because of feelings you may have either pro or con with regard to the LDS Church that you think might affect your ability to be a fair and impartial juror in this case? If so, I'd like you to raise your hand.

(R. 1023-1025; Hornsby at 23; app. A.)

The court then stated for the record that all members of the panel had indicated religious feelings would have no effect on their decision. (Hornsby at 23; app. A.)

The trial court refused Hornsby's request to question the potential jurors as to their religious affiliation, their residence in the religious unit (stake) in which the LDS welfare farm was located or whether any of them held office in the LDS Church. (R. 325-328; Hornsby at 23-24; app. A.)

ARGUMENT

POINT I

THE SIGNIFICANCE OF THE CASE

It is Respondent's position that although this case presents an issue of great importance, the issue was properly dealt with and resolved by the Utah Court of Appeals. That is, the Court of Appeals recognized that the trial court had abused its discretion and committed reversible error by refusing to voir dire prospective jurors as to their religious affiliation for the limited purpose of gathering enough information in order to intelligently exercise his peremptory challenges. The Court of Appeals realized that the peremptory challenge performs a valuable

function in the jury system and that its efficacy is vitiated when a party is not permitted to gather enough information from prospective jurors in order to intelligently exercise that right.

The Court of Appeals further recognized that the law in this area is well settled and it therefore remanded the case back to District Court for a new trial. Because the law is so well established in this area, this is not a case which should be entertained by this Court.

POINT II

DURING THE VOIR DIRE PROCESS OF A TRIAL IN WHICH A RELIGIOUS ENTITY IS A PARTY THERETO, A LITIGANT SHOULD BE ALLOWED TO INQUIRE AS TO THE RELIGIOUS AFFILIATION OF A PROSPECTIVE JUROR FOR THE PURPOSE OF INTELLIGENTLY EXERCISING A PEREMPTORY CHALLENGE.

It is a widely accepted principle of law that whenever a religious organization is a party to the litigation, the religious faith of a prospective juror is a proper subject of inquiry. 47 Am. Jur. 2d, Jury, Section 283. There is a plethora of case law which supports this basic proposition.

The landmark case of Casey v. Roman Catholic Archbishop of Baltimore, 143 A.2d 627 (Md. 1958) addressed the issue concerning the voir dire inquiry of a prospective juror's religious affiliation. In Casey, the Maryland Court of Appeals set forth as follows:

> [T]he law is clear that, if the religious affiliation of a juror might reasonably prevent him from arriving at a fair and impartial verdict in a particular case because of the nature of the case, the parties are entitled to ferret out, or preferably have the court discover for them, the existence of bias or prejudice resulting from such affiliation. In other words, a party is entitled to a jury free of all disqualifying bias or prejudice without exception, and not merely a jury free of bias or prejudice of a general or abstract nature....Miles v. United States, 1881, 103 U.S. 304, 26 L.Ed. 481 [jurors asked if they believed in the truth of Mormon teachings]...We hold that the examination of the prospective jurors on their voir dire in this case was not sufficiently comprehensive to assure the selection of a fair and impartial jury.

Casey, 143 A.2d at 632

It is plaintiff-respondent's position that in accordance with Casey, Plaintiff's counsel in the case at bar should have been permitted to voir dire prospective jurors concerning their affiliation with the defendant LDS Church. That is, pursuant to Casey, the parties are entitled to ferret out or discover the existence of any and all disqualifying bias or prejudice a juror may have as a result of being affiliated with a religious entity which is a party to the lawsuit. It is this respondent's belief that the ferreting out of bias or prejudice applies to latent bias as well as acknowledged bias. Accordingly, it is very reasonable to assume that although a prospective juror may make a blanket statement that he is capable of being an impartial juror, that juror may harbor a latent and unacknowledged prejudice or bias because of his religious affiliations. As the Supreme Court of

Utah stated in State v. Ball, 685 P.2d 1055, 1058 (Utah 1984):

> The most characteristic feature of prejudice is its inability to recognize itself. It is unrealistic to expect that any but the most sensitive and thoughtful jurors (frequently those least likely to be biased) will have the personal insight, candor and openness to raise their hands in court and declare themselves biased.

Thus, although none of the prospective jurors answered affirmatively when asked if they would find it difficult to be fair and impartial and render a judgment against the LDS Church, had the trial court permitted inquiry into the religious affiliation of prospective jurors, plaintiff's counsel would have had an opportunity to exercise his peremptory challenges in a more considered manner.

In Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed. 759 (1965), the United States Supreme Court discussed the function of the peremptory challenge:

> The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury. See Lewis v. United States, 146 U.S. 370, 376. Although "[t]here is nothing in the Constitution of the United States which requires the Congress [or the States] to grant peremptory challenges," Stilson v. United States, 250 U.S. 583, 586, nonetheless the challenge is "one of the most important of the rights secured to the accused," Pointer v. United States, 151 U.S. 396, 408. The denial or impairment of the right is reversible error without a showing of prejudice, Lewis v. United States, supra; Harrison v. United States, 163 U.S. 140; cf. Gulf, Colorado & Santa Fe R. Co. v. Shane, 157 U.S. 348. "For it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose." Lewis v. United States,

supra, at 378.

> The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise.
>
> * * *
>
> The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control. [citations omitted] While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. [citations omitted] It is often exercised upon the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another," [citations omitted], upon a juror's "habits and associations" [citations omitted]...It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. [emphasis added]

Swain, 380 U.S. at 219-220.

Accordingly, inasmuch as a person's religion is not readily discernable from appearance, a peremptory challenge exercised on religious grounds necessarily presupposes an inquiry into the same.

In State v. Barnett, 445 P.2d 124 (Or. 1968), counsel was permitted to ask a prospective juror whether he had any religious belief or affiliation that would prevent him from being a fair juror. However, counsel was not permitted to follow-up the

juror's answer by asking what his religious faith was. In reversing the trial court, the Oregon Supreme Court stated as follows:

> It is true that the prospective jurors stated that they did not have any religious beliefs that would prevent them from being impartial jurors and from giving the defendant a fair trial. A party does not need to be limited by that answer, however; he can pursue the matter and find out the particular religious belief of the venireman. A party can make his own determination whether a venireman with a particular belief will be impartial or unprejudiced and exercise his peremptory challenge accordingly.

Barnett, 445 P.2d at 125.

Further, in State v. Ball, 685 P.2d 1055 (Utah 1984) this Court discussed the utilization of peremptory challenges. This Court stated as follows:

> Properly utilized, however, it may be seen that the peremptory challenge performs a valuable function in our jury system. It's efficacy is necessarily vitiated when a party is not permitted to gather enough information from prospective jurors in order to exercise his right intelligently. In State v. Taylor, Utah 664 P.2d 439, 447 (1983), we emphasized that "voir dire examination has as its proper purposes both the detection of actual bias and the collection of data to permit informed exercise of peremptory challenge. (citations omitted)

Ball, 685 P.2d at 1059.

Thus, in accordance with the Ball decision, in order for a peremptory challenge to perform its proper function, a party must be permitted to gather enough information from prospective jurors to enable him to intelligently exercise that right. In the

instant case plaintiff's inquiry was curtailed to a point where he was unable to gather enough information to allow him to intelligently exercise his right to peremptory challenges. This was reversible error and the Court of Appeals recognized it as such.

Another case supportive of plaintiff-respondent's position is United States v. Affleck, 776 F.2d 1451 (10th Cir. 1985) wherein the Tenth Circuit Court of Appeals found that the trial court provided a fair trial when it allowed a forty-four page questionnaire to be submitted to prospective jurors asking for detailed information about, inter alia, religious affiliation. Affleck involved the prosecution of a defendant who had defrauded persons affiliated with the Mormon Church. Returning a guilty verdict in Affleck would vindidate the rights of Mormons, and, therefore, counsel needed to ferret out religious bias and prejudice - acknowledged or latent - against the accused. In the instant case, a verdict finding liability on the part of the defendants would be a finding against the Mormon Church and therefore plaintiff's counsel should have been permitted to ferret out religious bias against the plaintiff. That is, a juror who was a member of the LDS Church may very well have perceived the lawsuit as being a cause brought against "my church." Counsel for plaintiff should have been afforded an opportunity to find out any such latent bias.

See also Coleman v. United States, 379 A.2d 951 (D.C. App. 1977) wherein the District of Columbia Court of Appeals stated:

> Inquiry as to a juror's religious beliefs is proper on voir dire where religious issues are presented expressly in the case, or where a religious organization is a party to the litigation, or where it is a necessary predicate to the exercise of peremptory challenges.

Coleman, 379 A.2d at 954.

For other cases consistent with the aforementioned case law, see the following: McGowan v. United States, 485 A.2d 1191 (D.C. App. 1983); State v. Miller, 88 P.2d 526 (Id. 1939); Young v. State, 271 P.426 (Ok. 1928).

Based upon the case law cited herein, Respondent maintains that the Utah Court of Appeals was correct in its determination that the trial court committed reversible error by impairing plaintiff's right to intelligently exercise his peremptory challenges. More specifically, in the case at bar the Utah Court of Appeals set forth as follows:

> Substantial impairment of the right to informed exercise of peremptory challenges is reversible error. Swain, 380 U.S. at 219; Ball, 685 P.2d at 1060. In the instant case, the trial court abused its discretion in denying voir dire regarding the prospective jurors' affiliation with the LDS Church. The scope of voir dire should be sufficiently broad to allow the parties intelligently to exercise their peremptory challenges.

87 UTAH ADV. Rep. 23 (1988) [see decision at appendix A]

POINT III

> PETITIONER'S ARGUMENT CONTAINED IN POINT III OF ITS BRIEF WAS NOT TIMELY RAISED, AND THEREFORE SHOULD NOT BE ENTERTAINED BY THIS COURT.

At page 13 of Petitioner's brief, it is argued that

"Constitutional and statutory provisions governing jury selection make religious questioning for peremptory challenge purposes improper." Petitioner then refers this Court to Article I Section 4 of the Constitution of Utah, Article VI Section 3 of the United States Constitution, and Section 78-46-3, Utah Code Annotated.

Inasmuch as Petitioner failed to raise the aforementioned provisions in arguing before the Court of Appeals in this matter, he is precluded from raising arguments based on those provisions at this time.

POINT IV

DURING THE VOIR DIRE PROCESS OF A TRIAL IN WHICH A RELIGIOUS ENTITY IS A PARTY THERETO, A LITIGANT MAY INQUIRE AS TO THE RELIGIOUS AFFILIATION OF A PROSPECTIVE JUROR WITHOUT VIOLATING ANY CONSTITUTIONAL AND/OR STATUTORY PROVISIONS CONCERNING JURY SELECTION.

As set forth hereinabove, Respondent herein maintains that the Consitutional arguments raised in Point III of Petitioner's brief are not timely and therefore should not be entertained. However, even if timely raised, the arguments of Petitioner are misplaced and may not be relied upon in the instant case. Petitioner cites a number of constitutional and statutory provisions as standing for the proposition that the religious affiliation of prospective jurors may not be inquired into during the voir dire process. Specifically, Petitioner states as follows:

> These clear and unequivocal statements prevent both a religious test for service as a juror and any form of discrimination by any governmental agency against persons on account

> of religious preference or the absence of religious preference.
>
> * * *
>
> The ruling of the Court of Appeals...requires courts to use their power in cases in which a religion is involved to compel jurors to disclose religious views so that peremptory challenges can be used systematically to discriminate against jurors of a particular religious persuasion.

In State v. Ball, 685 P.2d 1055 (Utah 1984) this Court discussed Article I, Section 4 of the Utah Constitution, one of the same provisions which Petitioner asserts precludes inquiry into a prospective juror's religious affiliation. In Ball, the Court set forth the following:

> Article I, Section 4 of the Utah Constitution states in pertinent part: "The rights of conscience shall never be infringed...nor shall any person be incompetent as a...juror on account of religious belief or the absence thereof." We must decide whether this provision of the Utah Constitution prohibits asking a prospective juror whether his abstention from alcohol is based on "personal or religious" grounds.
>
> [1] The question of whether the juror's abstention was "for a personal conviction or a religious one" has only a minimal relationship to the constitutional language regarding incompetence of jurors because of "religious belief or the absence thereof." The mere asking of the question has nothing to do with competence to serve, that is, with the juror's basic qualifications to participate in a panel.
>
> * * *
>
> Religious beliefs, unlike gender or race, are not readily apparent, and their existence, if directly related to the subject matter of the suit (as they may be in a case involving

alcohol consumption), must be determined by preliminary inquiry. Should those religious beliefs (or the absence thereof) be the basis for actual bias, prejudice, or impartiality, a challenge for cause would likewise lie. In that event, an individual would not be declared "incompetent...on account of religious belief" in violation of the constitution, but rather unfit to serve in a particular cause because of actual prejudice. The fact that actual bias or prejudice is related in some way to an individual's religious beliefs does not preclude exclusion for demonstrated inability to serve as an impartial juror. To declare otherwise would be to subordinate the rights of a criminal defendant to receive a fair trial before an impartial jury to the persons prejudiced by their religion (or irreligion) against certain defendants or behavior. Such a conflict between constitutional values is not required by the language of Art. I, Section 4.

* * *

Thus the question of one's competence for jury service generally is a separate question from the issue of one's potential lack of impartiality in a particular case. [emphasis added]

* * *

[4] Properly utilized, however, it may be seen that the peremptory challenge performs a valuable function in our jury system. Its efficacy is necessarily vitiated when a party is not permitted to gather enough information from prospective jurors in order to exercise his right intelligently. In State v. Taylor, Utah 664 P.2d 439, 447 (1983), we emphasized that "voir dire examination has as its proper purposes both the detection of actual bias and the collection of data to permit informed exercise of the peremptory challenge" (citations omitted). We view the question asked here by defense counsel as being reasonably calculated to discover any latent bias that may have existed among the four veniremen who stated that they did not drink; the information sought, even if it would not have supported a challenge for cause, would

> have allowed defense counsel to exercise his peremptory challenges more intelligently.

Similarly, in the instant case if counsel were permitted to inquire as to a juror's religious affiliation, and then utilize a peremptory challenge to dismiss that juror, the juror dismissed would not be deemed incompetent on account of religious belief in violation of the constitution; rather, it would merely be a determination that the juror harbored a latent prejudice or bias in this particular cause. That is, as set forth in Ball, the question of one's competence to be a juror is a different and separate question from the issue of one's potential lack of impartiality. The mere asking of the question concerning religious affiliation has nothing to do with competence to serve and with a juror's basic qualification to participate in a panel.

Accordingly, inasmuch as a litigant is entitled to collect data to permit an informed exercise of the peremptory challenge, and to ferret out any existing latent bias, merely inquiring into one's religious affiliation does not transgress any constitutional or statutory provision.

See also Swain v. Alabama, 380 U.S. 202, 85 S.Ct 824, 13 L.Ed 759 (1965) wherein the United States Supreme Court set forth the following:

> [Peremptory challenges are often] exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the...religion...or affiliations of people summoned for jury duty.
>
> * * *

> In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause.

Swain, 380 U.S. at 220 and 221

Implicit within this language is the Supreme Court's belief that inquiry into a prospective juror's religious affiliation does not transgress Constitutional standards. That is, the Court realizes that peremptory challenges may be exercised based upon a person's religious affiliation. It follows that exercising a peremptory challenge based upon one's religious affiliation necessarily entails an inquiry into the same. Moreover, if such an inquiry would be in violation of constitutional provisions, the Supreme Court certainly would have used different language than that cited hereinabove.

POINT V

> DURING THE VOIR DIRE PROCESS OF A TRIAL IN WHICH A RELIGIOUS ENTITY IS A PARTY THERETO, AN INQUIRY AS TO A PROSPECTIVE JUROR'S RELIGIOUS AFFILIATION DOES NOT INVADE THE JUROR'S RIGHT TO PRIVACY.

Without citing any authority in support of its position, Petitioner, at Point IV of its brief intimates that an inquiry into a prospective juror's religious affiliation would invade the juror's right to privacy of religious beliefs.

It is this respondent's belief that merely inquiring into one's religious affiliation is not tantamount to an invasion of that person's privacy.

In State v. Ball, in determining that juror privacy was not

an issue in the case, the Utah Supreme Court stated as follows:

> The mere revelation of the general fact that a religious belief is the basis of a practice, without a further probing of the nature or extent of any particular religious belief, does not result in any injury to the juror. Any harmless disturbance of a juror's privacy that may occur through the revelation of such general information is outweighed by its close relevance to the possibility of bias in the context of a trial for driving under the influence of alcohol.
>
> We hold that asking a venireman whether his abstention from the drinking of alcohol has a religious basis is not prohibited by the Utah constitution.

Ball, 685 P.2d at 1060.

Similarly, an issue of juror privacy does not exist on the facts of this case. Plaintiff-respondent did not wish to probe into the extent of any juror's particular religious belief. Rather, respondent merely desired to inquire as to the general religious affiliation of prospective jurors, including to which local units of the LDS Church the member may belong, whether the individual holds any leadership position or is employed by the Church etc. without probing into specific religious beliefs. Further, inasmuch as the LDS Church is a party to this lawsuit, any harmless disturbance of a juror's privacy that may occur through the revelation of such general information is clearly outweighed by its close relevance to the possibility of bias.

CONCLUSION

One of the basic objectives of our judicial system is to

ensure litigants of a fair trial, free of any bias or prejudice. To help ensure a fair trial, voir dire examination has become an important part of a jury trial. Voir dire examination has as its proper purposes, both the detection of actual bias as well as the collection of data to permit informed exercise of peremptory challenges. The function of the challenge is to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence presented at trial, and not otherwise. Accordingly, if a peremptory challenge is to perform its proper function, a party must be permitted to gather enough information from prospective jurors to enable him to exercise his challenges intelligently.

The courts have consistently held that a litigant may ferret out information so as to detect any latent bias that may have a prejudicial effect on the outcome of a case. In the case at bar, the Utah Court of Appeals recognized that the trial court committed reversible error by improperly limiting voir dire. That is, in a situation such as this wherein the LDS Church is a party-defendant, the religious affiliation of a juror might prevent him from arriving at a fair and impartial verdict. Specifically, a juror who is a member of the LDS Church may very well perceive the lawsuit as a cause of action against "my church". Because of the possible existence of a juror's latent bias resulting from being affiliated with a party-defendant, Respondent was entitled to discover any such bias resulting from religious affiliation. Thus, he should have been permitted to inquire in some detail as

to the religious affiliation of prospective jurors.

Further, pursuant to the overwhelming authority cited hereinabove, a litigant in a case such as this may inquire as to the religious affiliation of a prospective juror without violating any constitutional provisions and without invading a juror's right to privacy.

Inasmuch as the law is well settled in this area, and the Court of Appeals has rectified the error committed by the trial court, this Court should deny Petitioner's Petition for Certiorari.

DATED this 7TH day of October, 1988.

BLACK & MOORE

/S/
James R. Black

/S/
Kevin M. McDonough

/S/
Laura Boyer
Attorneys for Plaintiff-Appellant-Respondent James Hornsby

CERTIFICATE OF MAILING

I hereby certify that four (4) true and correct copies of the Brief in Opposition to Petition for Certiorari was mailed, postage fully prepaid, this 7th day of October, 1988 to the following:

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APPENDIX A

Cite as
87 Utah Adv. Rep. 23

IN THE UTAH COURT OF APPEALS

James HORNSBY,
Plaintiff and Appellant,
v.
CORPORATION OF THE PRESIDING BISHOP of the Church of Jesus Christ of Latter-day Saints, a Utah corporation sole, Charles Giblett, John Sutton, and John Does I through X, inclusive,
Defendants and Respondents.

Before Judges Bench, Billings and Jackson.

No. 880031-CA
FILED: July 26, 1988

THIRD DISTRICT
Honorable Timothy R. Hanson

ATTORNEYS:

Mary A. Rudolph, Laura L. Boyer, James R. Black.

Stephen G. Morgan for Respondent Sutton.

Allen M. Swan for Respondent LDS Church.

OPINION

BENCH, Judge:

Plaintiff appeals from a judgment of no cause of action entered on a special jury verdict. Because the trial court improperly limited voir dire of the jury panel, we vacate the judgment and remand the case for a new trial.

On March 30, 1983, defendants Charles Giblett, a farmer for defendant Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints (L.D.S. Church), and John Sutton were attempting to load into a horse trailer two cows owned by the L.D.S. Church. Approximately one month earlier, the two cows had crossed the fences separating Sutton's property and the L.D.S. Church's welfare farm located immediately northwest of Sutton's property. Sutton and Giblett had agreed to delay retrieving the cows to avoid disturbing Sutton's cattle.

On March 30, Sutton opened his corral gate and backed his trailer into the opening. He and Giblett then attached the gate to the trailer with baling wire and a hook. As the two men attempted to herd the cows into the trailer, one cow entered the trailer, but the other cow threw its weight against the gate, dislodging it from the trailer. The cow exited the corral and entered a large field owned by Kennecott Corporation. For the next hour, Sutton and Giblett, assisted by Sutton's daughter Mary and two boys, attempted to direct the errant cow back onto Sutton's property. Sutton and Mary drove in separate vehicles with emergency lights flashing, trying to locate the cow. Mary parked and exited her car in a further attempt to locate the cow. When she spotted the cow, she returned to her car.

At that moment, plaintiff James Hornsby, an employee of Kennecott, was driving home on his motorcycle. He noticed Mary waving her arms at him, but considered her waving to be a greeting, not a warning. Approximately 200 feet past Mary and her car, the cow darted out onto the road. Unable to avoid the cow, Hornsby laid his motorcycle down on the road and suffered serious injuries.

Hornsby filed this action for damages, alleging negligence on the part of defendants. In response to special interrogatories, the jury found no negligence on the part of any of the defendants but determined plaintiff was negligent and his negligence was the proximate cause of his injuries. The trial court entered judgment on the verdict in favor of defendants.

On appeal, Hornsby alleges the trial court erred in refusing to voir dire members of the jury panel concerning their affiliation with the L.D.S. Church. At the time of voir dire, Hornsby proposed the following questions, among others, to the trial court:

> Are any of you members of the L.D.S. Church?
> Would that, in any way, affect your ability to evaluate the evidence in this case and render a fair decision for the plaintiff?
> Did any of you hold a position in the L.D.S. Church such as Bishop or presiding officer or counselor?
> Which stake was that in? Where is that located?[1]
> Would that position affect you in making a fair decision in this case?
> If the evidence were favorable to the plaintiff in this case, would you have a problem in awarding a judgment against the L.D.S. Church?

The trial court rejected Hornsby's proposed questions, later explaining "it's none of this Court's business, or anybody's business what [jurors'] religious preferences are." The court then asked:

> Are there any of you who feel that you would have trouble being an impartial juror because of feelings you may have either pro or con with regard to the L.D.S. Church that you think might affect your ability to be a fair and impartial juror in this case? If so, I'd like you to raise your hand.

The court stated for the record that all members of the panel had indicated religious

rulings would have no effect on their decision.

Hornsby argues the trial court erred in limiting voir dire regarding the jury panel's religious affiliations. The L.D.S Church contends where religious doctrine or practices are not at issue, it is not proper for a court to inquire as to a juror's religious affiliation. The scope of voir dire is a matter within the sound discretion of the trial court, and its rulings with respect thereto will not be disturbed on appeal absent a demonstrated abuse of discretion. *Maltby v. Cox Constr. Co., Inc.*, 598 P.2d 336 (Utah 1979), *cert. denied*, 444 U.S. 945 (1979). The trial court abuses its discretion when, "considering the totality of the questioning, counsel [is not] afforded an adequate opportunity to gain the information necessary to evaluate jurors." *State v. Bishop*, 753 P.2d 439, 448 (Utah 1988).

Voir dire has as one of its purposes the detection of bias sufficient to challenge a prospective juror for cause. *State v. Taylor*, 664 P.2d 439 (Utah 1983). Under Utah R. Civ. P. 47(f), a prospective juror may be challenged for cause on any of the following grounds:

> (1) A want of any of the qualifications prescribed by law to render a person competent as a juror.
> (2) Consanguinity or affinity within the fourth degree to either party, or to an officer of a corporation that is a party.
> (3) Standing in the relation of debtor and creditor, guardian and ward, master and servant, employer and employee, or principal and agent, to either party, or united in business with either party, or being on any bond or obligation for either party; provided, that the relationship of debtor and creditor shall be deemed not to exist between a municipality and a resident thereof indebted to such municipality by reason of a tax, license fee, or service charge for water power, light or other services rendered to such resident.
> (4) Having served as a juror, or having been a witness, on a previous trial between the same parties for the same cause of action, or being then a witness therein.
> (5) Pecuniary interest on the part of the juror in the result of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation.
> (6) That a state of mind exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals or common notoriety, if it satisfactorily appears to the court that the juror can and will, notwithstanding such opinion, act impartially and fairly upon the matter to be submitted to him.

We believe the question asked by the trial court was sufficient to detect any actual subjective bias to warrant a challenge for cause under subsection (6). Because it is not necessary to this appeal, we do not decide whether the voir dire was sufficient to reveal circumstances or relationships that would warrant challenges for cause under other subsections of Rule 47(f).

A second proper purpose for voir dire is "the collection of data to permit informed exercise of the peremptory challenge." *Taylor*, 664 P.2d at 447. Regarding peremptory challenges, the United States Supreme Court has held:

> The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control. While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable.

Swain v. Alabama, 380 U.S 202, 220 (1965) (citations omitted). A prospective juror's group affiliations is a common and proper topic for voir dire and ground for a peremptory challenge. As the *Swain* Court continued:

> [A peremptory challenge] is often exercised ... upon a juror's "habits and associations" .... It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, *religion*, nationality, occupation or affiliations of people summoned for jury duty.

Id. (quoting *Hayes v. Missouri*, 120 U.S. 68, 70 (1887)) (emphasis added).

The issue of religion as a topic for voir dire was addressed in *State v Ball*, 685 P 2d 1055 (Utah 1984). In *Ball*, defendant was charged with driving under the influence of alcohol.

During voir dire, the trial court asked the jury panel whether any of them had prejudices against people that drink. None indicated they did. Defendant then asked if any of them chose not to drink for any reason. Four jurors responded they did not drink. Defendant then proposed to the trial court to ask if those jurors' choice not to drink was for a personal or a religious conviction. The trial court, concerned with constitutional protections, denied defendant's request. Defendant was able to eliminate three of the four non-drinking jurors by exercising all of his peremptory challenges, but the fourth sat on the jury which convicted him.

On appeal, the Utah Supreme Court held defendant's question as to the four jurors' reasons for their non-use of alcohol should have been allowed. The Court acknowledged the "extreme deference afforded in *Swain* to the unfettered exercise of [peremptory] challenges," and stated as follows:

> Religious beliefs, unlike gender or race, are not readily apparent, and their existence, if directly related to the subject matter of the suit ... must be determined by preliminary inquiry .... Voir dire is intended to provide a tool for counsel and the court to carefully and skillfully determine, by inquiry, whether biases and prejudices, latent as well as acknowledged, will interfere with a fair trial if a particular juror serves in it.

Id. at 1057, 1058.

Both *Swain* and *Ball* recognize there are cases where religion and group affiliation are appropriate topics for voir dire. In the instant case, defendant did not propose to question the prospective jurors as to their specific beliefs.[2] Rather, as the L.D.S. Church was one of the parties, defendant merely proposed to question the jurors regarding their affiliation with the L.D.S. Church. Whenever a religious organization is a party to the litigation, voir dire regarding the jury panel's religious affiliations is proper. *State v. Via*, 146 Ariz. 108, 704 P.2d 238 (1985); *Coleman v. United States*, 379 A.2d 951 (D.C. 1977); *Casey v. Roman Catholic Archbishop of Baltimore*, 217 Md. 595, 143 A.2d 627 (1958).

Substantial impairment of the right to informed exercise of peremptory challenges is reversible error. Swain, 380 U.S. at 219; *Ball*, 685 P.2d at 1060. In the instant case, the trial court abused its discretion in denying voir dire regarding the prospective jurors' affiliation with the L.D.S. Church. The scope of voir dire should be sufficiently broad to allow the parties intelligently to exercise their peremptory challenges. In so holding, we do not require the trial court to propound the precise questions proposed by Hornsby. Rather, we leave intact the considerable discretion afforded to trial courts to contain voir dire within reasonable limits. *See Ball*, 685 P.2d at 1060 (trial court has a duty to protect juror privacy); *People v. Williams*, 29 Cal.3d 392, 628 P.2d 869, 174 Cal. Rptr. 317 (1981) (trial court should not permit inordinately extensive and unfocused questioning). The judgment in favor of defendants is vacated and the case is remanded for a new trial.[3]

In light of our decision to remand for a new trial, it is not necessary to discuss Hornsby's other alleged errors. However, since the trial court may be faced with the same issues on remand, we make the following observations. *See State v. Hansen*, 734 P.2d 421, 428 (Utah 1986).

Hornsby argues defendants' use of the term "welfare" when referring to the farm owned by the L.D.S. Church improperly biased the jury in their favor and was in violation of a court order. We fail to find any merit in Hornsby's contention. The subject property is commonly referred to as a welfare farm. Hornsby offers no evidence of improper bias other than mere speculation. Furthermore, Hornsby fails to cite to any record evidence of a court order regarding the use of the term "welfare."

Hornsby also argues the trial court erred in refusing to instruct the jury on res ipsa loquitur, negligence per se, and strict liability. "A party is entitled to have the jury instructed on his theories of the case and points of law provided competent evidence is presented to support them." *Steele v. Breinholt*, 747 P.2d 433, 435 (Utah App. 1987). We will reverse a trial court's judgment for failure to give a requested instruction only if the jury is prejudicially misled or insufficiently or erroneously advised on the law. *Id.*

To warrant a res ipsa loquitur instruction, a plaintiff must show: 1) the accident was one which ordinarily does not happen but for someone's negligence; 2) plaintiff's own use or operation of the agency or instrumentality was not primarily responsible for the injury; and 3) the agency or instrumentality causing the injury was within defendant's exclusive control and management. *Roylance v. Rowe*, 737 P.2d 232, 235 (Utah App. 1987). Hornsby claims the evidence in the instant case establishes the three required elements for a res ipsa loquitur instruction. However, application of res ipsa loquitur presupposes a plaintiff's inability to point to the specific allegedly negligent act which caused the injury. *Kusy v. K-Mart Apparel Fashion Corp.*, 681 P.2d 1232 (Utah 1984). If the "evidence in the case reveals all of the facts and circumstances of the occurrence and clearly establishes the precise allegedly negligent act which is the cause of plaintiff's injury," then res ipsa loquitur is not applicable. *Roylance*, 737 P.2d at 235.

In the instant case, the evidence presented at trial described and established the act committed by Giblett and Sutton which Hornsby alleges to be negligent. Defendants backed the horse trailer into the corral gate opening. They then attached the rear doors of the trailer to the gate with baling wire. As they attempted to load the cows into the trailer, one of the cows threw its weight against the gate, dislodging it from the trailer. The cow escaped through the opening. As the allegedly negligent act was clear from the evidence, res ipsa loquitur was not applicable.

The trial court also refused Hornsby's requested instruction on negligence per se. Violation of a statute or ordinance is negligence per se. *Jorgensen v. Issa*, 739 P.2d 80 (Utah App. 1987). Hornsby argues defendants violated Salt Lake County Ordinances §10-10-3 (1966) (now §14.20.050 (1986)), which states:

> Every person staking, tethering, herding, grazing or pasturing; or allowing to run at large or causing to be staked, tethered, herded, grazed or pastured, or allowed to run at large, any horse, cow, mule, sheep, goat or swine, or other animal upon any of the public highways of the county shall be guilty of a misdemeanor.

Defendants' conduct was not in violation of section 10-10-3. They were not staking, tethering, herding, grazing, or pasturing the errant cow under the common definitions of those terms. Nor did defendants "allow" the cow to run at large. *See Santanello v. Cooper*, 106 Ariz. 262, 475 P.2d 246 (1970) ("allow" means to sanction, permit, acknowledge, approve of).

In any event, section 10-10-3 must be construed in light of Utah Code Ann. §41-6-38(3) (1987), which states:

> In any civil action brought by the owner, operator, or occupant of a motor vehicle ... for damages caused by collision with any domestic animal or animals on a highway, there is no presumption that the collision was due to negligence on behalf of the owner or the person in possession of livestock.

Utah Code Ann. §41-6-16 (1987) provides:

> The provisions of this chapter are applicable and uniform throughout this state and in all of its political subdivisions and municipalities. A local authority may not enact or enforce any rule or ordinance in conflict with the provisions of this chapter. Local authorities may, however, adopt ordinances consistent with this chapter, and additional traffic ordinances which are not in conflict with this chapter.

The trial court's refusal of Hornsby's requested negligence per se instruction was correct.

Finally, Hornsby contends the court erred in refusing to instruct the jury on strict liability. Hornsby claims the cow had a dangerous or vicious tendency known to defendants. Nothing in the record supports his assertion. The court's refusal to give the instruction was therefore justified.

Russell W. Bench, Judge

I CONCUR:
Judith M. Billings, Judge

I CONCUR IN THE RESULT:
Norman H. Jackson, Judge

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1. A stake is a geographical unit in the L.D.S. Church. In his appellate brief, Hornsby also claims he should have been allowed to ask whether any juror attended the Oquirrh Stake from where the cow came, whether any of them held positions in that stake, and whether any of them ever volunteered at the subject farm or knew anyone who had or did.

2. The religious beliefs of the prospective jurors are not directly related to the subject matter of this suit, and hence could not properly be examined during voir dire.

3. Defendants John and Mary Sutton argue any potential prejudice in favor of the L.D.S. Church caused by the trial court's error did not affect the jury's finding as to their lack of negligence. However, in view of the overlapping nature of the possible liabilities, justice requires a new trial as to all defendants. *See Kord's Ambulance Serv., Inc. v. White*, 14 Ariz. App. 294, 482 P.2d 903 (1971).

Cite as
87 Utah Adv. Rep. 26

IN THE UTAH COURT OF APPEALS

Steven V. SUMMERS,
Plaintiff and Appellant,
v.
Gerald COOK, Warden, State Prison,
Defendant and Respondent.

Before Judges Orme, Davidson, and Bench.

No. 870070-CA
FILED: July 27, 1988

THIRD DISTRICT
Honorable J. Dennis Frederick

ATTORNEYS:
James N. Barber for Appellant.
David L. Wilkinson, Sandra L. Sjogren, Stanley H. Olsen for Respondent.

APPENDIX B

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IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

JAMES N. HORNSBY, Plaintiff, vs. CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a Utah corporation sole, CHARLES GIBLETT, JOHN SUTTON AND MARY LEE SUTTON, and DOES I through X, Inclusive, Defendants.	JUDGMENT ON VERDICT Civil No. ~~C 85-5019~~ C 83-5019 Honorable Timothy R. Hanson

The above entitled matter came on regularly for trial before the Honorable Timothy R. Hanson, District Judge, commencing Tuesday the 29th day of October, 1985 and continuing through Friday the 1st day of November, 1985, Laura L. Boyer appearing for plaintiff, Allen M. Swan of Kirton, McConkie & Bushnell appearing for defendants Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints and Charles Giblett and Stephen G. Morgan of Morgan, Scalley & Reading appearing for defendants John Sutton and Mary Lee Sutton

heard and the matter having been submitted to the jury on a Special Verdict and the jury having returned its Special Verdict finding that the plaintiff, James Hornsby, was negligent and that his negligence was a proximate cause of the accident and finding that none of the defendants were negligent, now therefore it is hereby

ORDERED that judgment enter on the verdict in favor of each of the defendants and against the plaintiff, no cause of action together with defendants' costs incurred herein in the sum of $TO BE DETERMINED UPON FILING OF AN APPROPIATE MEMORANDUM OF COSTS — TMA.

DATED this 14 day of November, 1985.

BY THE COURT:

ATTEST
H. DIXON HINDLEY
Clerk
By Evelyn Thompson
Deputy Clerk

District Judge

Served by mailing copies this 14th day of November, 1985, to Laura L. Boyer, 3167 West 4700 South, Salt Lake City, Utah 84118 and to Stephen G. Morgan, 261 East 300 South, 2nd Floor, Salt Lake City, Utah 84111.

Allen M. Swan